UNITED STATES OF AMERICA BEFORE THE NATIONAL LABOR RELATIONS BOARD Washington, D.C.

FORTUNA ENTERPRISES, L.P., A DELAWARE LIMITED PARTNERSHIP D/B/A THE LOS ANGELES AIRPORT HILTON HOTEL AND TOWERS

Respondent

Cases 31-CA-27837

31-CA-27954

31-CA-28011

and

UNITE HERE, LOCAL 11

Charging Party

ANSWERING BRIEF OF COUNSEL FOR THE GENERAL COUNSEL TO THE RESPONDENT'S EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S SUPPLEMENTAL DECISION

To:
Lester A. Heltzer
Executive Secretary
National Labor Relations Board
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I. PROCEDURAL POSTURE AND INTRODUCTION

On October 21, 2008, Administrative Law Judge John J. McCarrick (ALJ), issued his original decision in which he found that Respondent committed numerous Section 8(a)(1) and (3) violations, including issuing employees written warnings, interrogating and threatening employees, denying hotel access to employees, and suspending 77 employees for engaging in protected concerted activity. On April 30, 2009, the Board issued its decision affirming the ALJ's rulings, findings, and conclusions, except for a single Section 8(a)(1) allegation, which the Board severed and remanded to the ALJ for, *inter alia*, credibility determinations.

The single Section 8(a)(1) issue remanded to the ALJ pertains to Complaint Paragraph 9 alleging that Respondent's chef Pablo Burciaga physically pushed employees Herman Chan, Antonio Campos, and Juan Banales away from employees engaged in protected concerted activity, and jabbed his finger into the chest of employee Mike Kaib when Kaib protested Burciaga's action. The Board noted the ALJ did not make an express finding with respect to the credibility of Campos and Banales.

On July 21, 2009, ALJ McCarrick issued his supplemental decision ("SD") in which he made credibility findings concerning the testimony of Campos and Banales, and found that Respondent violated Section 8(a)(1) as alleged. Respondent filed exceptions over this finding. Pursuant to Sections 102.46 and 102.47 of the Board's Rules and Regulations, the undersigned respectfully submits this Answering Brief to Respondent's exceptions to the ALJ's supplemental decision.

As more fully set forth below, Respondent's exceptions should be denied because they except to the ALJ's supplemental credibility findings, which as detailed herein, are properly rooted in relevant fact and law and supported by the entire record. As such, based on the Board's long established policy not to overrule an ALJ's credibility resolutions unless contradicted by the

clear preponderance of the evidence, as set forth in *Standard Dry Wall Products*, 91 NLRB 544 (1950), enf. 188 F.2nd 362 (3rd Cir. 1951), Respondent's request to overrule the ALJ's supplemental decision should be rejected.

II. STATEMENT OF FACTS AND DISCUSSION

A. The ALJ in His Supplemental Decision Properly Discredited Respondent's Witness and Credited Witnesses for Counsel for the General Counsel

As instructed by the Board, the ALJ in his supplemental decision made the appropriate credibility determinations with respect to Campos and Banales in finding and concluding that banquet chef Burciaga's pushing of employees was coercive and violated the Act as alleged. In this regard, the ALJ in his supplemental decision noted that "Campos and Banales impressed me with their forthright attitudes together with their long history of employment with Respondent while Burciaga was often non-responsive to questions. Campos and Banales displayed no hostility in their demeanor and gave detailed complete and consistent testimony without contradiction.... I credit the testimony of both Campos and Banales and do not credit Burciaga." (SD 2:33-45). The ALJ's credibility findings, as more fully set forth below, are not contradicted by the clear preponderance of the evidence, and should therefore be affirmed. *Standard Dry Wall Product*, supra.

B. The ALJ's Supplemental Finding and Conclusion That the Coercive Pushing of Employees by Banquet Chef Pablo Burciaga Violated the Act, as Alleged in Complaint Paragraph 9 (SD 2:1-3:15.), Is Properly Supported by the Credible Evidence

Contrary to Respondent's contention, the ALJ's supplemental findings and conclusions of law (SD 2:10-21.) are properly supported by the evidentiary record. The credible evidence contained in the transcripts (Tr.) showed the following: Kitchen employees Antonio Campos and Juan Banales had worked for Respondent as cooks for 24 years and 16 years, respectively. (Tr. 54:13-24; 55:25; 209:10-210:12.) In 2006, both Campos and Banales were supervised by

admitted Section 2(11) supervisor banquet chef Pablo Burciaga ("Burciaga"). (Tr. 55:2-18; 210:13-15.) In April 2006, cooks Campos, Banales, and Chan, along with about 14 to 20 other coworkers, gathered in the kitchen to discuss the need for certain kitchen equipment with admitted Section 2(11) supervisors Manny Collera and Efrain Vasquez. (Tr. 61:13-62:9; 210:23-213:9.) The area of the kitchen where the discussion occurred was a non-public area, away from guests, and an area where employees would normally gather and talk about non-work related issues. (Tr. 66:15-18; 82:1-83:16; 214:21-215:12; 1091:13-24.) As the employee delegation started, another supervisor notified Burciaga of the employee gathering. (Tr. 1016:22-1018:11; 1042:23-1044:16.)

As further found by the ALJ in his supplemental decision (SD 2:21-31.), while the employees were discussing the kitchen problems with supervisors Collera and Vasquez, banquet chef supervisor Burciaga abruptly approached the employee group and physically grabbed employee Herman Chan by the shoulder, pushing him away from the meeting/delegation. (Tr. 65:21-67:2; 84:22-85:11; 216:8-217:8; 219:15-221:14.) Burciaga then assaulted Juan Banales and grabbed him by the shoulder pushing him away from the meeting. *Id.* Next, Burciaga grabbed Campos and pushed him away from the meeting. *Id.* Banales, Campos, and Chan were led away and were no longer able to participate in the kitchen discussion. (Tr. 69:18-20; 220:24-221:13.) Burciaga was aware the employee delegation was Union related when he pulled Campos, Chan, and Banales away from it because Burciaga stated so by admitting he recognized many meeting participants as Union supporters. (Tr. 1042:23-1044:16.)

The credible evidence in the record also establishes that, as supervisor Burciaga physically pulled employees Campos, Banales, and Chan away from the meeting, another employee who was present at the meeting, Mike Kaib, turned to help his co-workers. (Tr. 67:3-69:10; 217:9-218:10; 1026:18-1029:16.) Kaib turned and approached Burciaga telling him to leave them alone and not

to push them (Campos, Banales, and Chan), that they were not doing anything wrong. *Id*. Supervisor Burciaga turned to confront Kaib and jabbed Kaib in the chest with his index finger telling Kaib to "shut up" and that it was "none of [his] business." *Id*.

Consequently, because the ALJ's supplemental finding and conclusion that banquet chef Pablo Burciaga violated the Act, as alleged, is properly supported by the admissible evidence as note above, Respondent's exceptions should be dismissed.

C. The ALJ's Supplemental Decision Is Supported by the Applicable Case Law

The ALJ properly relied on *Impressive Textiles, Inc.*, 317 NLRB 8, 12-13 (1995) in issuing his supplemental finding, conclusion, and analysis. (SD 3:8-11.) In that case, similar to the facts of the instant dispute, the Board found a Section 8(a)(1) violation where the company owner approached employee "A" who was talking to another co-worker about union related information during his break and aware of their union conversation, the owner ended the conversation by pushing employee "A" telling him to return to work. See also *Cox Fire Protection*, 308 NLRB 793 (1992) (owner's statement "this isn't a threat, but I want to kick your ass," held violative of Section 8(a)(1) as employees could reasonably fear that the owner was clearly disposed to unfavorably exercising his authority as an employer against any employee involved in protected concerted activity).

As such, as noted herein, the ALJ in his supplemental decision properly found and concluded based on the credible evidence and applicable case law that the coercive pushing of employees by banquet chef Pablo Burciaga violated the Act as alleged in Complaint Paragraph No. 9. (SD 3:3-17.) The ALJ's supplemental decision, including credibility findings, further

findings of fact, and conclusions of law and recommended order, should be affirmed and Respondent's exception on this point should be rejected.

III. CONCLUSION

It is clear that the ALJ's supplemental decision is properly supported by the evidence in the record, applicable case law, and credibility resolutions. Respondent's exceptions require the Board to overturn the ALJ's credibility findings. Because the ALJ's findings are not contradicted the clear preponderance of the evidence, the Board should deny Respondent's exceptions in their entirety.

Dated at Los Angeles, California, this 22nd day of September 2009.

Respectfully submitted,

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